United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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76-1236

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

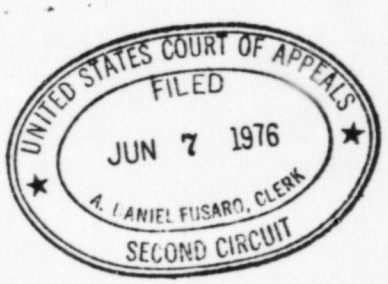
Plaintiff-Appellee,

-against-

MANUEL FRANCISCO PADILLA-MARTINEZ,

Defendant-Appellant.

Docket No. 76-1236



PETITION SUGGESTING REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MANUEL FRANCISCO PADILLA-MARTINEZ, Defendant-Appellant.	Docket No. 76-1236

PETITION SUGGESTING REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, appellant Padilla-Martinez suggests that rehearing en banc be granted from an order and judgment of a panel of this Court (The Honorable Tom C. Clark, Associate Justice of the Supreme Court, Retired; The Honorable William H. Timbers, Circuit Judge; The Honorable Charles H. Tenney, District Judge) entered on June 2, 1975,[1] and an opinion filed on June 4, 1975.

[1] On June 3, 1976, an application for release pending trial was filed before Mr. Justice Marshall; the application was denied on June 7, 1976.

This case presents the important issue of the construction of 18 U.S.C. §3164 requiring that a defendant in continuous custody for more than 90 days be released from custody if his trial is not begun on or before 90 days, unless the delay is due to the fault of the defendant or his counsel.

The District Judge denied the motion for release. He found no fault of counsel, but concluded that the excludable periods of 18 U.S.C. §3161(h) applied to extend the time period of 18 U.S.C. §3164 (see Appendix B). The panel of this Court found that the delay was due to the fault of counsel. The panel also appears to have held the entire Speedy Trial Act unconstitutional, and declined to rule on whether §3161(h) applies to §3164 (see Appendix A).

I. The Facts and the Issue of Fault

On February 19, 1976, appellant Padilla-Martinez, a permanent legal resident of the United States with no prior record, was indicted along with several others by a grand jury of the Southern District of New York (76 Cr. 164) for violation of the Federal narcotics laws. On that same day he was taken into Federal custody.[2] On February 20, 1976, he was arraigned befor

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[2]Appellant was arrested on September 3, 1974, by New York City Police and Special Agents of the Drug Enforcement Administration after a joint Federal-State investigation relating to alleged narcotics violations under both State and Federal law. Subsequently appellant was indicted for violation of State narcotics laws. On September 24, 1975, the State court

a United States Magistrate and held on $50,000 bail.

On February 3, 1976, Judge Tenney entered a plea of not guilty for appellant, continued the bail previously set, and, pursuant to normal court practice, assigned the case to another district judge, Judge Carter, for all purposes. Apparently, pursuant to Rule 8(b) of the Calendar Rules of the Southern District,[3] Judge Tenney stated that there would, at that proceeding, be no time set for motions (Minutes of March 30, 1976, at 18).

On March 24, 1976, counsel for appellant filed a motion to dismiss the indictment for lack of speedy trial.

Although Rule 9(a) of the Southern District Interim Plan for Achieving Prompt Disposition of Criminal Cases pursuant to

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(Footnote continued from the preceding page)

judge granted a motion to suppress evidence seized. Appellant has been in custody since September 3, 1974.

[3]Rule 8(b) states:

> Criminal motions.
>
> All motions in criminal actions shall be returnable before the assigned judge at such time as he directs. All criminal motions must be made within the time required by the Federal Rules of Criminal Procedure, except that the time for motions otherwise required by such rules to be made before the entry of a plea shall be made within ten (10) days after the entry of a plea, or at such other times as the assigned judge directs.

Rule 12(b) of the Federal Rules of Criminal Procedure, like Rule 8(b), permits the District Judge to set the time for motions.

Rule 50(b), Fed.R.Cr.P. and the Speedy Trial Act, requires a pretrial conference as soon after arraignment as possible, Judge Carter held no conference until March 30, 1976.

At that conference, appellant and his counsel were advised by Judge Carter that he would not reach the case for trial until mid-May (Minutes of March 30, 1976, at 12). The Judge directed that defense counsel file their pretrial motions within two days -- that is, by April 1, 1976 -- and that the Government file its responses by April 7, 1976 (Minutes of March 30, 1976, at 20).

On April 1, 1976, appellant's counsel filed with Judge Carter's chambers a motion to suppress, a motion for a hearing on wiretaps, and a memorandum of law in support of the motion to dismiss.[4]

Although required to file responsive papers by April 7, 1976, the Government did not file its papers opposing the motions until May 6, 1976, and May 14, 1976. An additional affidavit was filed by appellant's counsel on May 14, 1976, at the request of Judge Carter made on May 13, 1976.

On May 17, 1976, the District Court commenced a hearing on the motion to suppress. On May 20, 1976, counsel sought the release of appellant pursuant to 18 U.S.C. §3164, on the

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[4] Counsel joined in a memorandum of law on the motion to suppress prepared by counsel for a co-defendant which was also filed on April 1, 1976.

ground that appellant had been in continuous detention more than 90 days without commencement of his trial.

On May 24, 1976, the trial, expected to be ten weeks long (Minutes of March 30, 1976, at 10), was begun, and on May 25, Judge Carter denied the motion for appellant's release from custody.

After a reading of the facts of this case, it is apparent that the opinion of the panel makes several critical omissions and errors. Chronologically, these are:

1. The original district judge (Judge Tenney) followed the procedure authorized by Rule 8(b) of the Calendar Rules of the Southern District and declined to set a date for pretrial motions, leaving that for the judge (Judge Carter) who was to be assigned to the case.

The opinion erroneously refers to Rule 8(b) as the rule requiring motions to be filed within ten days of assignment. Perhaps the rule meant by the Court is Rule 9 of the General Rules of the District Court, which requires that all motions and accompanying memoranda of law be served within ten days of the return date. Excluded from this are motions in criminal cases which are covered by Rule 8(a) of the Calendar Rules.

2. Notwithstanding Rule 9 of the Speedy Trial Interim Plan of the Southern District, Judge Carter waited from February 23, 1976, to March 30, 1976, to hold a pretrial hearing, thus delaying the proceedings.

3. At the pretrial conference held on March 30, 1976, Judge Carter stated that he could not reach this case until mid-May. He himself required defense motions to be filed on April 1, 1976. The Government was directed to respond by April 7, 1976.

4. Counsel for appellant Padilla-Martinez filed his motions with a memorandum of law with the District Court on April 1, 1976.

The panel decision finds that some motions of counsel representing other defendants were filed later. Those filings, if they were late,[5] should not preclude appellant Padilla-Martinez' release, for his counsel fully complied with Judge Carter's requirements.

5. The Government filed its responsive papers more than one month after the April 7 date required by Judge Carter. This fact is not mentioned in the panel decision, but was not disputed by the Government.

6. Although Judge Carter received appellant Padilla-Martinez' papers by April 1, he appears to have done nothing until May 13, when he requested an additional affidavit which was filed the following day.

The panel decision is wrong on the facts. There is no basis for holding defense counsel at fault.

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[5] No other counsel appeared before the panel of this Court to argue the facts of his client's case.

II. Section 3161(h) does not apply to Section 3164

Under the Speedy Trial Act of 1974, 18 U.S.C. §3164, detained persons held solely for trial must be tried within 90 days following the beginning of their continuous detention. The failure to commence a trial within that time requires the defendant's release from custody unless the delay is caused by the "fault" of the defendant or his attorney.[6] Section 3164 contains no qualifying provisions, no excludable periods, and no limitations on the requirement that the detained person be released from custody.

Despite the clear, plain, and unambiguous language of the statute, Judge Carter, unsatisfied with the necessity of releasing appellant Padilla-Martinez on bail, chose to apply the excludable periods of §3161(h) -- an entirely separate section -- to the interim time. A reading of the entire statute and the statutory history yields no support for the proposition that the excludable periods of §3161(h) are applicable to §3164. The Ninth Circuit and the United States District Court for the Eastern District of California have so held, thus resulting in a conflict with the decision of the District Court. United States v. Tirasso, Doc. No. 76-1571 (9th Cir., March 25, 1976) (Appendix C); United States v. Soliah, Doc. No. 75-523 (E.D.Cal., January 14, 1976) (Appendix D).

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[6] Judge Carter found that the period of custody exceeded 90 days and that the delay was not the fault of counsel. See Appendix B at 4.

The Speedy Trial Act of 1974, 18 U.S.C. §3161, sets out a 100-day time limit for commencement of trial, applicable to all cases, whether or not the defendant is in custody. The applicability of this time period is, however, delayed until July 1, 1979. Prior to that date the time periods apply on a modified, phasing-in schedule which, until July 1, 1979, are reduced from 250 days to 175 days to 120 days to 100 days. 18 U.S.C. §§3161 (f), (g); 3163(a), (b). Title 18 U.S.C. §3161(h) lists excluded periods which are subtracted from the time period, thereby extending the time for commencement of trial.

It is provided in 18 U.S.C. §3162 that, for the failure to comply with the time periods of §§3161(b) and (c), as extended by §3161(h), the remedy is dismissal of the indictment, under some circumstances with prejudice. This statutory sanction becomes effective on July 1, 1979.

By way of contrast, §3164 is immediately effective. It applies only to detained defendants and those defendants designated as "high risk." It requires a trial within 90 days of continuous custody and contains only one sanction -- release from custody on such bail and conditions as the court may set. It does not contain excludable periods and does not refer to §3161(h). Section 3164 and its sanction remain in effect until July 1, 1979, when §3161, with its excludable time periods and its sanction of dismissal, becomes operative. Thus, §3164 is designed to apply to the period prior to July 1, 1979, in order to prevent lengthy pretrial custody when no other statutory

sanction is in effect. It does not determine the merits of a case or preclude the Government from prosecuting.

The legislative history of the statute supports appellant Padilla-Martinez' position that the excludable periods of §3161(h) do not apply to §3164. The Report of the Senate Judiciary Committee on S.754 (S.Rep. No. 93-1021, 93rd Cong., 2d Sess. (1974)) sets out the structure of the statute, explaining that there was a 90-day time period for trial with excludable periods, and making no reference to interim time periods (Id. at 20-22). A later reference to §3164 states:

> This section [3164] would require jurisdictions to implement interim time limits within three months of enactment, to remain in effect until the effective date of the time limits of subsections 3161(b) and (c). (See Calendar of Implementation, Chart 1, p.55). These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be tried within 90 days. The sanction for failure to try detained defendants within 90 days would be release....
>
> Id. at 27.

In the portions of the Senate Report labeled "Summary of Sections" and "Analysis of Sections," §3161(b) and (c) are discussed with the excludable periods of §2161(h). (Id. at 26, 27, 31, 32, 35). The §3164 interim time periods are discussed separately, with no inclusion of §3161 or excludable periods. The Report says:

> Section 3164 would require jurisdictions to implement interim plans within

> three months of enactment to remain in effect until the effective date of the 90-day time limits of subsection 3161(b) and (c). (See Calendar of Implementation, Chart 1, p.55). These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be tried within 90 days.
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> Section 3164 has been added to title I of the legislation as a result of the suggestion by Professor Freed that certain minimal speedy trial requirements be placed into operation soon after enactment and until the courts are prepared to implement the mandatory time limits. These interim plans would be similar to the plan adopted by the United States Court of Appeals for the Second Circuit. (See Section IV. Discussion, pp.17-20). The section would require trials within 90 days for pretrial detainees or "high risk" defendants who are on pretrial release, pending the full effectiveness of sections 3161 and 3162. The sanctions for failure to adhere to the limits would not be dismissal, as in section 3162, but pretrial release in the case of detainees and review of release conditions in the case of high risk releasees. The provision would not apply to detainees who have already been convicted of another offense because independent grounds for their detention exist.
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> Id. at 44-45.

The House Report (H.R.Rep. No. 93-1058, 93rd Cong., 2d Sess. (1974)) similarly discusses §3164 entirely separately from §3161, and makes the same statement about §3164:

> During the first four years under the bill, interim time limits are provided for the trial of individuals detained and those released pending trial who have been designated by the attorney for the Government as being of "high risk." This section would require the trial of these individuals within 90 days following the beginning of deten-

> tion or designation as "high risk." Moreover, any persons designated "high risk" or detained before the effective date of the interim time limits, is entitled to be brought to trial within 90 days from the date this section becomes effective. The interim time limits become effective 90 days after enactment of the bill. Failure to commence the trial of a detained person under this section results in the automatic review of the terms of release by the court and, in the case of a person already under detention, release from custody. [Section 3164]
>
> Id. at 23.

No reference is made to excludable periods, and the absence of any such reference is indicative of the non-inclusion of the excluded periods. Rewis v. United States, 401 U.S. 808, 812 (1971).

Judge Carter relied on Congressional reference to the earlier Second Circuit Rules Regarding Prompt Disposition of Criminal Cases Pursuant to 28 U.S.C. §322 (effective May 24, 1971) and the Southern District Plan for Achieving Prompt Disposition of Criminal Cases Pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure (effective April 1, 1973) to support his conclusion that the §3161(h) excludable periods apply. In those earlier plans applicable in the Second Circuit, excludable periods did expressly apply to the period of pretrial release. However, Congress obviously had before it the Second Circuit models providing for continued custody in "exceptional circumstances" and the application of excludable periods, but chose not to adopt the language of the models.

It is apparent that the earlier plans applicable to this Circuit are different from the statute in other ways as well. The plans required only that the Government be ready for trial. The statute applies to all participants in the process and requires that the trial actually commence. The ultimate time requirements of the statute are 100 days, some 80 days fewer than the Second Circuit predecessors. Thus, while the plans are similar to the statute in some ways, there are obvious important differences which require rejection of the idea that the dissimilarities were Congressional oversights.

Thus, the legislative history supports the plain meaning of the statutory language. The two sections -- §3161 and §3164 -- are effective at different times and for different purposes. They establish separate schemes for the pre- and post-July 1, 1979, period. There is no attempt to equalize the time periods or the applicability of the statutory sanctions. Rather, in the period before July 1, 1979, Congress chose to deal specifically with the small number of cases which required immediate attention to prevent lengthy pretrial custody rather than to force the criminal justice system to deal with every case before it immediately. There was obvious concern about pretrial custody in this period during which Congress permitted, albeit temporarily, a longer period for commencement of trial than it considered to be desirable, and authorized no other statutory sanctions for delays. Until the system is finally geared up to be able to handle the ultimate sanction of dismissal, Con-

gress chose to prevent the injustice of lengthy pretrial custody. The inapplicability of the exclusionary periods of §3161(h) to the 90-day period of custody is thus explicable despite the fact that after July 1, 1979, a defendant in custody may be detained longer than 100 days. Ultimately, improper delays in those cases will result in dismissal.

Section 3164 requires the district courts to establish an interim plan to carry into effect the Speedy Trial Act. Under the interim plan promulgated by the Southern District of New York pursuant to §3164, Rule 3 requires the commencement of the trial of a defendant within 90 days of his continuous custody. Under Rule 4(a)(1), the failure to commence a trial within that period requires that the defendant be released from custody. There are no conditions or excludable periods listed or mentioned.

Rule 5 of the interim Southern District Plan requires the Government's readiness for trial within six months in all cases. The sanction for the Government's failure to be ready in that time is dismissal with prejudice. In determining whether the time schedule is complied with, Rule 5 specifically refers to the excluded periods listed in Rule 6. Rule 6 states that the excludable periods apply to the time periods in Rule 5, and Rules 5 and 6 do not refer to the interim periods of Rules 3 and 4. Rules 3 and 4 naturally make no reference to Rules 5 and 6.

The statute's language and scheme and the legislative history establish that Judge Carter was wrong in applying §3161(h) to §3164.

III. Release is required even though the trial has begun

Commencement of the trial in this case does not preclude the relief sought. In this case, the trial has already commenced; indeed, it began before Judge Carter filed his opinion denying the motion for appellant Padilla-Martinez' release. The statute reads:

> ... No detainee shall be held in custody pending trial after the expiration of the 90-day period required for commencement of trial.

"Pending" is defined as "begun but not yet completed; during; before the conclusion of...." BLACK'S LAW DICTIONARY at 1291 (4th ed. 1951); see also BALLENTINE'S LAW DICTIONARY at 929, 930 (3d ed. 1969). Thus, the right to be released on bail accrued when the trial did not begin on the ninetieth day of appellant's continuous custody, and is not terminated until the trial is completed by a judgment.

IV. The assertion of flight is made in bad faith

The argument advanced by the Government and the District Judge that appellant will flee if he is released on bail is irrelevant to the application of the statute. United States v. Tirasso, supra. What is more, the Government's claim that appellant Padilla-Martinez will flee lacks any basis in fact.

One co-defendant has been free on bail for 17 months without leaving the jurisdiction. Moreover, appellant Padilla-Martinez is a permanent legal resident of the United States with no previous record. Further, under 18 U.S.C. §3146, the District Court can impose whatever conditions are necessary to assure his appearance.

V. Constitutionality of the Statute

In its opinion in this case the panel of this Court wrote:

> We find at least two grounds on which affirmance is required. The first is a constitutional one which we will not elaborate further than to note that there is question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here.[4]

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[4] Some of the language of the Act is so sweeping that it might well be construed as more than procedural, assuming the Congress has the power to enact the latter. See Integration of Bar Case, 244 Wis. 8, 11 (NW(2) 8604 cited with approval in Lathrop v. Donahue, 367 U.S. 820, 825 (1961); Commonwealth v. Tate, 442 Pa. 45, 274 Atl. 193 (1971).

Appendix A at 4.

It is difficult to understand from this language whether the panel has rendered a decision on the constitutionality of the Speedy Trial Act and whether that decision applies to the entire statute or merely to 18 U.S.C. §3164. It is also impossible to determine the grounds for any finding of unconstitutionality. Worthy of note is the failure of the Government

to raise this claim to this Court or to adopt the position when Mr. Justice Clark presented it at oral argument.

If in fact there was a determination of unconstitutionality, the Second Circuit is now without a speedy trial plan.

Under Article I, Section 8, Clause 18 of the Constitution, Congress "shall have the power"

> [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Thus, Congress can make laws necessary and proper to constitute tribunals inferior to the Supreme Court (Article I, Section 8, Clause 9), to define and punish "offenses against the Law of Nations" (Article I, Section 8, Clause 10), and all laws necessary and proper for carrying into execution the judicial power. The judicial power extends to all cases arising under the Constitution and the laws of the United States (Article III, Section 2), limited by Amendments VI and VII requiring speedy trial and bail which is not excessive.

The Congress' powers must necessarily include the authority to enact legislation to carry into effect the judiciary's constitutional power as limited by that document. The Speedy Trial Act, §3164, does not remove the courts' power to decide cases or prevent consideration of issues before them or determine the results of any cases. The Act merely defines the procedures, as permitted by the Constitution, within which

the courts shall exercise the power to decide.

The means available to Congress to carry out its powers are those appearing to it to be the most "eligible and appropriate which are adopted to the end to be accomplished and are consistent with the letter and the spirit of the Constitution." Logan v. United States, 144 U.S. 263, 283 (1892).[7] Later, in Logan, the Court wrote:

> The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that very right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and and best adapted to attain the object.
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> Id., 144 U.S. at 293.

Here, Congress found that the right to a speedy trial and the right against excessive bail necessitated a release on bail if the trial were not begin within a specific time. Congress also realized that the time limit would require additional

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[7] Logan dealt specifically with the power of Congress to protect those in custody awaiting trial implied from the power to indict, try, and punish for crime.

money and careful planning, and adopted procedures for those considerations as well. This is not a case in which Congress renders the courts incapable of making decisions by refusing to supply them with funding (see Commonwealth ex rel. _____ v. Tate, supra, 442 Pa. 45, 274 Atl. 193 (1971)). To the contrary, the Congress was careful to explain its responsibility to provide funding.

The panel expressed no reason why the Act is an invasion of judicial power by Congress in violation of the Constitution, nor can we envision any. If the Government can present any, we ask only an opportunity to respond.

Conclusion

For the foregoing reasons, appellant Padilla-Martinez' petition for rehearing en banc should be granted, the order of the District Court reversed, and appellant released pending trial.

Respectfully submitted,

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June 7, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- MANUEL FRANCISCO PADILLA-MARTINEZ, Defendant-Appellant.	Docket No. 76-1236

APPENDIX TO THE PETITION
SUGGESTING REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

A

Cal. No.1221,1240-45 September 1975 Term

Argued: June 2, 1976 Decided: June 4, 1976

Docket No. 76-1236, 76-1243-1248

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UNITED STATES OF AMERICA, :

Appellee, :

v. :

MANUEL FRANCISCO PADILLA MARTINEZ, :

Appellant. :

- - - - - - - - - - - - - - - - - -x

BEFORE: CLARK*, Assoc. Justice, TIMBERS, Circuit Judge, TENNEY, District Judge**

Appeal from a judgment of the United States District Court, Southern District of New York, R. L. Carter, J.

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* Associate Justice, Retired, sitting by designation.

** of the United States District Court, Southern District, sitting by designation.

76-1236

U.S.v.Martinez

CLARK, Associate Justice:

Appellants appeal[1] from an order of the United States District Court for the Southern District of New York entered on May 24, 1976, denying a motion for their release from incarceration during trial, which is now in progress. Appellants claim that they are entitled to release pursuant to 18 U.S.C. § 3164 [The Speedy Trial Act, Public Law 93-619, 93d Congress 5754, January 3, 1975][2] because of the failure of the court to commence their trial before the expiration of ninety days following the inception of their continuous detention. The appellants were indicted for violation of the Narcotic Laws on February 19, 1976, the same day of their arrest by the federal officers,[3] and were arraigned and held on $50,000 bail upon pleas of not guilty.

On March 24, 1976 Manuel Francisco Padilla Martinez filed a motion to dismiss for failure to provide a speedy trial. Although no other motions had been filed the court called a pretrial conference on March 30, 1976, and on application of the appellants enlarged the time to file motions to April 1st and set the case down for trial on May 17, 1976. On the latter date hearings on the pretrial motions were held, continuing through May 21st. The motion to release from custody now before us was filed on May 20, 1976, on the ninety first day after the arrest and continuous custody of appellants by the federal authorities and was based on the Rules of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases (Interim Plan) as well as Section 3164. On May 21st the trial court overruled the motion and filed a written opinion on May 24, 1976, finding that the excludable period provisions of 18 U.S.C. § 3161 apply to § 3164.

The trial is now proceeding on its merits.

merits.

We heard argument on the appeal on June 2d, 1976 and affirmed the order of the district Court from the bench. We now file our opinion on the action taken.

1. The Contention of Appellants and the Reasoning of the District Court:

The ground on which appellants base their motion is that Congress did not provide specifically that the time limits and exclusions of Section 3161 apply to the interim plan of Section 3164. They say the language of the Section 3164 "contains no qualifying provisions, no excludable periods and no limitations" on the 90 day trial mandate. Two cases are cited, both from the 9th Circuit but one being a District Court opinion. The first is United States v. Tirasso, No. 76-157 (CA 9 March 25, 1976) and the second United States v. Steven Soliah, Criminal No. 75-523 (E.D. Cal. 1976). In Tirasso "the delay was occasioned by a lengthy investigation of a serious and massive criminal scheme" by government investigators. The delay was, therefore, at the door of the government and not Tirasso. He was released from custody. In Soliah the government sought a 30 day delay of trial on the ground that one of its witnesses was unable to attend because of pregnancy, complicated by diabetes. Such a delay, the court held, would be chargeable to the government and under General Order #63 of that District would require the release of Soliah from custody. The court specifically held that even though the Act permitted such a delay to be excluded that the District rule controlled. We find neither case apposite.

The District Court, construing the Act as a whole, held that the exclusions of § 3161(h) were equally applicable to Section 3164.

2. The Grounds for Affirmance:

We find at least two grounds on which affirmance is required. The first is a constitutional one which we will not elaborate further than to note that there is question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here.[4/]

Next, we find that both Section 3164 and Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (Interim) clearly require the exclusion of the time consumed in pre-trial matters. Section 3164 after requiring each judicial district to place into operation an interim plan provides that the trial of any (i) detained persons who are being held in detention solely because they are awaiting trial shall (b) "commence no later than ninety days following the beginning of such continuous detention..." And subsection (c) specifically provides: "Failure to commence trial of a detainee as specified in subsection (b) "through no fault of the accused or his counsel" (emphasis supplied) shall result in "the automatic review by the court of the conditions of release" and no detainee, as defined, "shall be held in custody pending trial after the expiration of such ninety day period..." As we have noted the indictment here was filed on February 19, 1976; arraignment was held on February 23d and not guilty pleas were entered. Although Rule 8(b) of the Southern District Rules require that motions be made within ten days after the entry of this plea the defendants made no motion whatever until March 24, 1976 when Padilla Martinez moved to dismiss. We note that he had no permission to file this document though it came long after

the expiration of the ten day period. On March 30th the District Court on application of the defendants permitted them to file delayed motions. Thereafter they filed a total of eight motions all the way from dismissal for failure to afford a speedy trial to the suppression of evidence, severance, double jeopardy, bills of particular, discovery and inspection of records. These motions were filed subsequent to the time set by the trial judge (April 1, 1976)[5/] and on May 17th a hearing on the motions was begun. It is admitted that this hearing was the cause of the delay in the commencement of the trial itself beyond the 90th day. On the 91st day while these motions were being heard another motion to dismiss under the Act and Rule was filed, calling the attention of the court the expiration of the 91st day. We hold that the delay here was directly attributable to the "fault... of the accused or his counsel." Section 3164, Rule 6.

The series of events above narrated show that defendants were at fault in not filing timely motions and in consuming sufficient time during the hearing thereon to trigger the passing of the 90th day. In the context of these facts and where the government insists that the appellants will flee in order to escape trial we find that their fault in delaying the filing and hence the decision on their motion was; and their prolonging of the hearing on the motions was the specific cause of the delay in commencing the trial after the 90th day.

We are not holding that the exclusions of Section 3161(h) are applicable to § 3164, as did the trial judge. While his opinion is quite persuasive we find it not necessary to adopt such an interpretation where Section 3164 itself spe-

cifically authorizes the action we take here.

Nor should our opinion be construed as a suggestion to the Circuit Council with respect to the formulation or approval of any District Speedy Trial Plans within its jurisdiction. Our holding, in this regard, is based entirely on the peculiar facts of this case as applied under Section 3164 (c).

Affirmed

FOOTNOTES

1/ Since Manuel Francisco Padillo Martinez perfected his appeal each of his co-defendants has requested leave to join on the original papers filed, save Francisco Cadena. The applications to join in the appeal are granted.

2/ Section 3164 provides that the district shall place an interim plan in effect requiring the trial of any person detained, or found to be of "high risk" as defined by the Act, beginning no later than ninety days following his continuous detention. The failure to commence the trial of a detainee through no fault of the accused or his counsel within the ninety day period shall result in his release from custody pending trial, etc. Pursuant to the Section, the Southern District of New York adapted Rules which in effect follow the Act.

3/ Prior to their arrest the appellants had been in custody of the State of New York for over sixteen months on state charges stemming from the same events involved here and which were investigated by a Joint Task Force of state and federal officers. The appellants seek to tie this period to the federal detention under United States v. Cabral, 475 F.2 715(1st Cir 1973). We find the holding inapposite since it antedates the Act and does not bear upon it.

4/ Some of the language of the Act is so sweeping that it might well be construed as more than procedural, assuming the Congress has the power to enact the latter. See Integration of Bar Case, 244 Wis. 8, 11 NW(2) 8604 cited with approval in Lathrop v. Donahue, 367 U.S. 820, 825 (1961); Commonwealth v. Tate, 442 Pa. 45, 274 Atl. 193 (1971).

5/ Rule 9(b) of the General Rules of the Southern District requires the inclusion of supporting memoranda as well as an affidavit must accompany some motions. The motions here were deficient in these respects as well as being OUT OF TIME.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

- against -

REV. ALBERTO MEJIAS, et al.,

Defendants.

- x

76 Cr. 164

B

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CARTER, District Judge

O P I N I O N

Defendants Rev. Alberto Mejias, Mario Navas, Estella Navas, Henry Cifuentes-Rojas, Jose Ramirez-Rivera, Manuel Francisco Padilla Martinez and Francisco Cadena [1] have moved for an order, pursuant to 18 U.S.C. §3164(b) and (c), releasing them from custody. The motion is denied. Because of the critical importance of the issues raised on this motion to the administration of the criminal justice system, and because of the apparent conflict between the opinions expressed herein and a decision of the United States Court of Appeals for the Ninth Circuit, it is my hope that the Court of Appeals of this Circuit will agree to an expedited consideration of these issues so that they can be authoritatively resolved for the circuit.

Facts

On February 19, 1976, the moving defendants were indicted by the government and charged with conspiracy and various substantive violations of the federal drug laws. On the same day, the moving defendants were arrested by federal agents and taken into federal custody. No state detainer is presently lodged against any defendant. Each of the moving defendants has been

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[1] Defendant Alba Luz Valenzuela has been released on bail and is therefore not a party to this motion.

unable to post the required bail and has been incarcerated in continuous federal custody since their arrest on February 19, 1976. On May 17, 1976, hearings on various pretrial motions were commenced. These hearings are still in progress and will continue right up until the commencement of trial. 2/

Discussion

The Speedy Trial Act of 1974 (P.L. 93-619), 18 U.S.C. §3161 et seq., provides in §3164 as follows:

> "§3164. Interim limits
>
> (a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving --
>
> (1) detained persons who are being held in detention solely because they are awaiting trial.
>
> ...
>
> (b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) ... of this section shall commence no later than ninety days following the beginning of such continuous detention ... . The trial of any

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2/ Although defendants seek further evidentiary hearings on wiretap minimization and violation of their Fifth Amendment rights by virtue of pre-indictment delay, it is likely that the trial will have commenced, when, as anticipated, this opinion is filed on May 24th.

person so detained ... on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel ... shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial."

Pursuant to the requirements of Rule 50(b), F.R.Crim.P., and in conformity with the provisions of the Speedy Trial Act of 1974, the judges of the United States District Court for the Southern District of New York adopted the "Interim Plan Pursuant To The Provisions Of The Speedy Trial Act of 1974" (hereinafter the "Interim Plan"). 3/ Rule 3 of the Interim Plan provides, in pertinent part, as follows:

"3. Time Requirements for Trial of Defendants in Custody and of High Risk Defendants

(a)(1) Trial of a defendant held in custody solely for the purpose of trial shall commence within 90 days following the beginning of continuous custody."

3/ The Interim Plan is effective from September 29, 1975, through July 1, 1976, at which time a newly revised Interim Plan will take effect.

Rule 4 of the Interim Plan provides, in pertinent part:

> "4. Effect of Non-Compliance
>
> (a) Upon the expiration of the time limits prescribed by Section 3:
>
> (1) A defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney shall be released subject to such conditions as the court may impose in accordance with 18 U.S.C. 3146."

Thus, it is clear from the statute and the Interim Plan that the trial of detained individuals must commence within 90 days following the beginning of detention. If trial is not commenced within this period, defendants must be released. [4] There is no dispute that the moving defendants have been in continuous federal custody in excess of 90 days. [5]

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[4] Defendants' motion was made on May 20, 1976, the 91st day of confinement.

[5] The only other requirement for release set out in §3164(c) and in Rule 4(a)(1) of the Interim Plan is that the defendants' trial has failed to commence through no fault of the accused or his attorney. I have little doubt that verbose and often irrelevant argument and cross-examination by defense counsel has significantly delayed the completion of pretrial hearings and the commencement of trial in this action. Nevertheless, I cannot in good conscience hold that such behavior rises to the level of "fault" within the meaning of §3164(c) and Rule 4 of the Interim Plan.

The government first argues that the defendants need not be released since the trial may be deemed to have commenced with the commencement of pretrial hearings on May 17, 1976 (i.e., within the 90 day period). I cannot accept this argument. It is clear that the terms of the Speedy Trial Act itself distinguish a "trial" from "pretrial" proceedings. A trial in a jury case is deemed to commence at the beginning of voir dire. 6/

6/ This definition or measurement of the period commencing trial was explicitly adopted in the Plan for Prompt Disposition of Criminal Cases (hereinafter "Plan for Prompt Disposition"), prepared pursuant to the requirements of the Speedy Trial Act of 1974, and approved and adopted by the judges of the United States District Court for the Southern District of New York, effective July 1, 1976. The Plan for Prompt Disposition was formulated in consultation with, and after considering the recommendations of, the Speedy Trial Planning Group for the Southern District of New York, and is subject to approval as required by 18 U.S.C. §3165(c). With regard to the measurement of the commencement of trial, reference should be made to Section III, 5(e)(2), at p.III-7 and Section III, 6(c)(3), at p.III-10.

I therefore hold that for purposes of the 90-day trial requirement of 18 U.S.C. §3164(b), and Rule 3 of the Interim Plan, trial of this action has not yet commenced.

The government next argues that even if this trial is not deemed to have commenced, the exclusionary periods set forth in 18 U.S.C. §3161(h) [7] and in Rule 6 of the Interim Plan may be applied to the 90-day requirement. If the §3161(h) exclusions do apply, the time expended on pretrial hearings would be excluded from the 90-day period, and the moving defendants would not be entitled to release.

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[7] 18 U.S.C. §3161(h) provides, in pertinent part, as follows:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence.
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
>
> ...
>
> (E) delay resulting from hearings on pretrial motions;
>
> ...
>
> (G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement."

The applicability of the §3161(h) exclusions to §3164 is far from explicit. Nevertheless, a careful reading of the legislative history of the Speedy Trial Act of 1974 leads to the conclusion that it was the intent of Congress to have the exclusions set out in §3161(h) apply to the interim limits of §3164 as well.

Section 3164 was introduced in order "that certain minimal speedy trial requirements be placed into operation ... pending the full effectiveness of sections 3161 and 3162." Senate Committee on the Judiciary, Speedy Trial Act of 1974, Report on S. 754, S.Rep. No. 93-1021, 93rd Cong., 2d Sess., at p. 45 (1974) (hereinafter "Senate Committee Report"). Section 3164 itself states merely that its intent is "to assure priority in the trial or disposition" of certain cases by imposing shorter time limits for certain cases during the interim period of the Act. It seems highly doubtful that Congress could have intended that the "minimal speedy trial requirements" of §3164 operate more strictly and with harsher results than will apply under §3161(b) and (c) when the Act takes full effect. 8/

8/ When §3161(b) and (c) go into effect on July 1, 1979 (and §3164 thereby ceases to operate) there will be a 100-day time limit excluding periods of excusable delay in which all defendants must be

(Footnote continued)

Furthermore, nothing in the statutory history indicates that §3164 was intended to create a separate category of cases to which the excludable periods would not apply. Indeed, Congress provided for exclusions "in recognition of the impossibility of providing rigid time limits for the trial of criminal cases." House Committee on the Judiciary, Speedy Trial Act of 1974, Report on H.R. 17409, H.Rep. No. 93-1508, 93rd Cong., 2nd Sess., at p.21 (1974) (hereinafter "House Committee Report"). Exclusions were provided to insure "that the rights of the individual to a complete and full hearing are not trampled in the headlong rush for the disposition of a trial." Id. at p.15. The House Committee Report concluded that:

> "The Committee believes that both delay and haste in the processing of criminal cases must be avoided; neither of these tactics inures to the benefit of the defendant, the Government, the courts nor society. The word speedy does not, in the Committee's view denote assembly-line justice, but efficiency in the processing of cases which is commensurate with due process." Id.

(Footnote continued from previous page)

brought to trial. It is anomolous at best that the exclusionary periods of §3161(h) should not apply to §3164 during the interim period merely because Congress failed to recognize explicitly the applicability of excludible periods to §3164.

Further support for the proposition that the excludable periods of §3161 apply to §3164 is to be found in the origins of that section. The Senate Committee Report indicates that the interim plans would be similar to the plan which had been adopted by the United States Court of Appeals for the Second Circuit. See Senate Committee Report, at p.15. In this regard, the Senate Report noted that:

> "[The Second Circuit] rules require the Government to be ready for trial ... within 90 days if he is detained. The rules also allow a number of traditional exclusions (i.e., for certain pretrial proceedings), suggested by the American Bar Association Standards and contained in many modern speedy trial statutes." Id. at p. 17.

Thus, Congress intended that the interim plans be similar to the one adopted by the Second Circuit--i.e., incorporating the "traditional exclusions." 9/

9/ Prior to the adoption of the Interim Plan on September 29, 1975, Rule 3 of the Plan for Achieving Prompt Disposition of Criminal Cases provided in pertinent part, as follows:

> "3. Detained Defendants: Trial Readiness and Effect of Non-Compliance.
>
> In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for

(Footnote continued)

Since §3164 is to be read in harmony with that Second Circuit plan, it must incorporate as well the traditional exclusions as enumerated in §3161.

I am of the view that a careful reading of the Speedy Trial Act of 1974, and the relevant legislative history, compel the conclusion I have reached. This Act, like any other statute, must be read in such a way as to render it a sensible and workable whole. As Mr. Justice Frankfurter observed in United States v. Shirey, 359 U.S. 255, 260-61 (1959):

(Footnote continued from previous page)

> trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary."

Rule 5 of that Plan sets out various excluded periods (including an exclusion for pretrial motions); by the terms of the Plan these excluded periods applied to the 90-day trial requirement of Rule 3.

"Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' United States v. Whitridge, 197 U.S. 135, 143, 25 S.Ct. 406, 408, 49 L.Ed. 696. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. See United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see United States v. Johnson, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose." Brooklyn Nat. Corp. v. Commissioner of Internal Revenue, 2 Cir., 157 F. 2d 450, 451. In ascertaining this purpose it is important to remember that no matter how elastic is the use to which the term scientific may be put, it cannot be used to describe the legislative process. That is a crude but practical process of the adaptation by the ordinary citizen of means to an end, except when it concerns technical problems beyond the ken of the average man."

Similarly, Mr. Justice Reed has stated:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning

> has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words." United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) (footnotes omitted).

I must point out that my analysis leads to a conclusion which is contrary to that reached in two recent opinions. Research has uncovered only two cases which have dealt with the applicability of the §3161 exclusions to §3164. In United States v. Steven Soliah, Crim. No. 75-523 (E.D. Cal., January 14, 1976), [10/] Judge Wilkins ruled that the §3161(h) exclusions do not "apply to a defendant who is incarcerated solely for the purpose of awaiting trial." The ruling was based first on the rationale that Sara Jane Moore v. U.S. District Court, Crim. No. 75-3384 (9th Cir., Nov. 12, 1975) had

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10/ The opinion is reported in Issuance #10 of the Administrative Office of the United States Courts, February 11, 1976.

by implication rejected the contention that excludable delay applies to §3164. Second, Judge Wilkins rejected the argument based on an analysis of the legislative history of the Speedy Trial Act which relies on the former Second Circuit plan since the Second Circuit plan "contained an explicit provision incorporating exclusions to the situation where the defendant is incarcerated solely for the purpose of awaiting trial." Finally, Judge Wilkins felt compelled to follow General Order #63 of his District, which requires release of an incarcerated defendant whose trial has not commenced within 90 days. Even if the Speedy Trial Act, standing alone, would require periods of time to be excluded from the computation of the 90-day time limit, Judge Wilkins was of the view that a District Court plan could be more restrictive than the Speedy Trial Act itself in making sure that the trials of incarcerated defendants proceed within the 90-day period. 11/

11/ I agree with Judge Wilkins that an interim plan may be more restrictive than the statute. However, to the extent that such a plan may be inconsistent with the language and intent of the statute, it cannot be binding.

More recently, in United States v. Tirasso, 12 / Crim. No. 76-1571 (9th Cir., March 25, 1976) the Court held that §3164 "does not provide any period of exclusion for delay occasioned by the special circumstances of difficult cases." In footnote 1 of its opinion, the Court opined as follows:

> "We note, by way of contrast, that the statute provides an elaborate series of exceptions or exclusions applicable to the permanent and transitional periods. 18 U.S.C. §3161(h). The fact that such exceptions or exclusions were explicitly provided in one portion of the statute but not in the other may have been the product of a drafting error, or perhaps was caused by a misunderstanding of the practical requirements of criminal administration. In any event, the contrast in the statute requires us to find that the clearly expressed congressional intent is to provide no periods of exclusion for the ninety-day trial requirement applicable during the interim period."

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12 / The opinion is reported in Issuance #12 of the Administrative Office of the United States Courts, March 30, 1976.

As I have indicated, I do not believe that these cases properly reflect the intent of Congress in drafting the Speedy Trial Act of 1974.

I recognize that Rule 6 of the Interim Plan which sets out the various excluded periods, by its terms refers only to computations made under Rule 5- the six-month rule. By negative implication it might appear, as defendants contend, that the Interim Plan expressly bars the exclusion of any of the Rule 6 excluded periods in computing the time requirements for trial of defendants in custody pursuant to Rule 3 of the Interim Plan. Indeed, this reading of the Interim Plan is confirmed in the Plan for Prompt Disposition, Section III, at p.III-12. [13] It is clear that with regard to computing any time limit under Section 6 (which relates to the 90-day rule regarding defendants in custody) there was a clear intention not to exclude any of the time periods set forth in

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13 / "10. Exclusion of Time From Computations

(a) Applicability. In computing any time limit under sections 3, 4, 5 or 7, the periods of delay set forth in 18 U.S.C. §3161(h) shall be excluded."

As indicated in note 6, supra, the Plan for Prompt Disposition, if approved, will not become effective until July 1, 1976.

§3161(h). Lest there be any doubt in this regard, I have communicated with Professor Michael Martin of Fordham Law School who served as Reporter for the Plan for Prompt Disposition; Professor Martin has confirmed my reading of the Plan for Prompt Disposition.

However, the proposed Plan for Prompt Disposition is not yet operative. While it must be conceded in light of the above recited legislative history that the planning group responsible for the formulation of the Plan for Prompt Disposition intended not to exclude time devoted to pretrial hearings, I am not convinced that the Board of Judges in adopting the Plan was fully aware of its implications. The question was not raised or discussed by the Board of Judges. In any event the current provisions of the Interim Plan, like the statute itself, do not compel the conclusion that time spent on pretrial hearings is not to be excluded. Therefore, I give the current Interim Plan a reading consistent with my understanding of the statute.

The government has represented that various of the moving defendants are illegal aliens and that several have entered this country with forged passports. Furthermore, the government indicates that it is impossible to establish the true identity of the defendants

with any certainty. Based on these facts, and its experience with respect to other individuals with whom the defendants are alleged to have associated, the government strongly believes that release of the defendants will in practical effect mean their imminent absence from this jurisdiction. 14 /

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14 / The moving defendants were arrested, some on September 3, and others on October 4, 1974, by state authorities. Defendants were held in state custody from the date of arrest until their indictment on February 19, 1976 by federal authorities. Mejias, Padilla, Salazar-Cadena, and Valenzuela, who, as has been indicated, is not involved in this motion, prevailed in the state courts on a motion to suppress evidence seized at the time of arrest from their person and upon a search of Mejias' apartment. They seek similar relief here. The evidentiary hearing on their motion to suppress consumed nearly a full week. Yet, such a hearing took over three weeks in the state court.

Moreover, defendants assert other violations of their right to a speedy trial. They contend that a 1974 state-federal decision for the state to prosecute them which was followed (after the state had lost the motion to suppress) by a subsequent state-federal decision for the federal government to proceed against them constitutes forum shopping. Cf. United States v. Lara, 520 F. 2d 460 (D.C. Cir. 1975). Defendants would have us count their state arrest and time in custody against the government for speedy trial purposes. While I consider their theory to be conceptually flawed, absent a clear and particularized showing of federal-state contrivance, because the parallel existence of the state and federal governments as separate

(Footnote continued)

It is clear that the issues raised on this motion are of vital significance to the continued effective administration of criminal justice in this District and Circuit, and a definitive resolution is urgently

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(Footnote continued from previous page)

sovereign entities is disregarded, the defendants seem to have authoratative support for their contentions. See Gravitt v. United States, 523 F. 2d 1211 (5th Cir. 1975).

Thus, defendants have delayed commencement of the trial by raising complex and novel issues requiring serious consideration. If pretrial hearings are not excluded from the 90-day limitation, courts in similar situations will be pressured either to give short shrift to a detainee's pretrial claims or to grant him his freedom in full recognition and expectation that once free he will flee. Obviously, these considerations are irrelevant if Congress intended that pretrial hearings not be excluded from the 90-day computation. I would suggest, however, that it is these considerations (the protection of a defendant's right to an evidentiary determination of his pretrial claims and the obligation of the court to give such contentions the careful attention and time justice requires) which make it inconceivable, at least to me, that Congress purposed the result the defendants urge.

needed. In this age of multi-defendant, multi-count indictments often charging conspiracies of long duration and international scope, it is evident that this issue is likely to recur with ever-increasing regularity.

Defendants' motion for release pursuant to 18 U.S.C. §3164(b) and (c) is hereby denied.

ORDERED.

Dated: New York, New York
May 24, 1976

ROBERT L. CARTER
U.S.D.J.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

[illegible] F. [illegible]
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

March 30, 1976
Issuance #12

TO: All Federal Judges, Planning Group Members, and Circuit Executives

Speedy Trial Advisory

SUBJECT: DECISION IN UNITED STATES v. TIRASSO, INTERPRETING "INTERIM" TIME LIMITS UNDER 18 U.S.C. § 3164

In an opinion written by Judge Kennedy, the Court of Appeals for the [illegible]nth Circuit has held that the exclusions of 18 U.S.C. §3161(h) do not [illegible]ply to computations under the 90-day "interim" time limit. The case [illegible] United States v. Tirasso, No. 76-1571, March 25, 1976. The other mem[illegible]ers of the panel were Judges Goodwin and Sneed.

The text of the opinion follows:

Appellants Tito Lombana-Pineres and Pietro Tirasso were indicted in the Southern District of New York on charges stemming from an alleged attempt to smuggle 20 kilograms of cocaine into the United States from Colombia. They were arrested on November 19, 1975. Subsequently a criminal complaint was issued in the District of Arizona and the New York indictment was dismissed. On January 5, 1976, a magistrate ordered the appellants' removal to the District of Arizona, where they were indicted on January 20, 1976. A superseding indictment was issued February 18, 1976, and trial was set for April 13, 1976.

Since their arrest, appellants have remained in continuous custody in lieu of $100,000 bail. Appellants' motion for release from custody on their own recognizance was denied by the district court. They appeal, arguing that the Speedy Trial Act of 1974, 18 U.S.C. § 3164, mandates their release because they have been in continuous custody for more than ninety days awaiting trial.

Appellants do not charge the government with bad faith in causing their removal to Arizona or in failing to bring them to trial immediately. The delays were necessary to gather evidence of a criminal conspiracy whose dimensions grew as the investigation proceeded, and which eventually proved to be of massive proportions.

The New York arrest and indictment charged appellants only with conspiracy to undertake a single transaction involving three defendants, but the subsequent Arizona indictments alleged that appellants engaged in a series of criminal transactions involving twenty-two defendants, in ten separate states, the Commonwealth of Puerto Rico, and four foreign countries. Arrest of the appellants prior to the conclusion of the investigation was necessary because they were foreign nationals, who had arrived only recently from abroad and were likely to leave the country at any time. While appellants could have been tried immediately for a portion of the conspiracy in the Southern District of New York, it was reasonable to remove them to Arizona, the hub of this far-flung conspiracy. Indeed, removal of such a case is required for the sound administration of criminal justice; the action conserved judicial resources and the resources of the defendants.

Appellants do not dispute the reasonableness of the procedures, the fact that the delay was occasioned by a lengthy investigation of a serious and massive criminal scheme, the good faith of the government, or the high probability that defendants will flee to foreign country. But they argue that such considerations are irrelevant. They point out that the statute unconditionally mandates release from custody in all cases where the defendants have not been brought to trial within ninety days of arrest. 18 U.S.C. § 3164(c).

We are constrained to agree. The language of section 3164 is straightforward. We find no ambiguity in its interpretation. Subsection (b) provides that the trial of persons held in custody solely because they are awaiting trial must commence within ninety days following the beginning of such continuous detention. Subsection (c) provides that the failure to commence trial within the ninety day period, where such failure is not occasioned by the fault of the accused or his counsel, must result in an automatic review by the court of the conditions of release, and further that "no detainees . . . shall be held in custody pending trial after the expiration of such ninety-day period . . . ." Under the clear language of the statute the reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel.

The legislative history, moreover, makes it clear that release of the defendant from custody, and nothing less, is the sanction for delay beyond the ninety-day period. "Failure to commence the trial of a detained person under this section results in the automatic review of the term of release by the court and, in the case of a person already under detention, release from custody." S. Rep. No. 1021, 93d Cong., 2d Sess., reproduced in, 4 U.S. Code Cong. & Ad. News 7401, 7416 (1974) (emphasis added).

The government contended below that the ninety-day period has not expired, since appellants have been in custody in the District of Arizona only since January 5, 1976. Appellants, however, contend that they have been in continuous custody for the same offense since November 19, 1975, and the fact that a portion of the detention occurred in the Southern District of New York is of no consequence.

Section 3164 does not speak of detention within a particular district. Nor does it provide any period of exclusion for delay occasioned by the special circumstances of difficult cases.[1] The statute simply provides that "the trial of any person [detained solely because they are awaiting trial] shall commence no later than ninety days following the beginning of such continuous detention." While the offense charged in the Arizona indictment is of a substantially larger scope than that charged in the New York indictment, they are both based on many of the same operative facts, and they are not, therefore, completely discrete offenses for which separate ninety-day periods might be applicable. Since appellants have been in custody for over ninety days awaiting trial on these charges, we hold that the clear and unambiguous terms of the Speedy Trial Act mandate their release pending trial.

We are fully aware of the dangers inherent in today's decision. The charges against these defendants are serious. We are not dealing with a haphazard attempt by amateurs to run the border with a small quantity of controlled substance, but rather with a sophisticated enterprise for importing wholesale quantities of dangerous drugs into the United States. The value of the 20 kilogram shipment alleged in the New York indictment was estimated between $500,000 and $600,000. The government's case, as now pleaded, alleges a series of six such transactions involving these two appellants. Appellant Tito Lombana has been identified as "the head of a huge organization responsible for sending large quantities of cocaine into the United States." Appellant Tirasso is identified as Lombano's liaison in the United States and as a direct participant in at least one previous transaction involving 5 kilograms of cocaine. Under these allegations the United States has the greatest interest in bringing these individuals to justice.

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[1] Our analysis is confined to § 3164, which pertains to all defendants in pretrial custody during the interim period from September 29, 1975, through June 30, 1979. We note, by way of contrast, that the statute provides an elaborate series of exceptions or exclusions applicable to the permanent and transitional periods. 18 U.S.C. § 3161(h). The fact that such exceptions or exclusions were explicitly provided in one portion of the statute but not in the other may have been the product of a drafting error, or perhaps was caused by a misunderstanding of the practical requirements of criminal administration. In any event, the contrast in the statute requires us to find that the clearly expressed congressional intent is to provide no periods of exclusion for the ninety-day trial requirement applicable during the interim period.

Release of these two foreign nationals from custody is tantamount to an invitation to flee across the Mexican border, less than 3 hours away. The district court, is denying appellants' motion for release, noted that there was virtually no way to assure the appearance for trial of a foreign national once he is set free in the District of Arizona. Defense counsel all but admitted that appellants, once released, could not be counted upon to appear. We have no doubt of the correctness of this proposition.

In light of these facts, the wisdom of the result Congress has decreed is questionable. We release a man alleged to be the head of a foreign criminal organization dedicated to the smuggling of large quantities of illegal drugs, so that he may quickly cross the border and resume operating his business. We are also releasing his alleged right-hand man, as if to make certain that the enterprise continues to operate at top efficiency. But this result is the only one open to us under the plain terms of the statute.

It is discouraging that our highly refined and complex system of criminal justice is suddenly faced with implementing a statute that is so inartfully drawn as this one. But this is the law, and we are bound to give it effect.

It is therefore ordered that the district court release the appellants within 48 hours of the filing of this opinion upon such terms and conditions as the court may deem reasonable and not inconsistent with the views expressed herein.

The mandate will issue now.

Remanded.

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William E. Foley
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

February 11, 1976
Issuance #10

TO: All Federal Judges, Planning Group Members, and Circuit Executives

Speedy Trial Advisory

SUBJECT: DECISION IN UNITED STATES v. SOLIAH, INTERPRETING "INTERIM" TIME LIMITS UNDER 18 U.S.C. § 3164

The following is an excerpt from the transcript of proceedings before Judge Philip C. Wilkins in United States v. Steven Soliah, Criminal No. 75-523, Eastern District of California, January 14, 1976:

THE COURT: The government has moved for a 30-day continuance in this matter because one of its witnesses will be unable to testify at the time currently set for trial, due to the fact that this witness is nearing termination of her pregnancy which is complicated by diabetes, from the doctor's statement and representations that Mr. Nichols, on behalf of the United States Attorney's Office made.

The Court agrees that this does present a compelling reason for granting a continuance, however, we do not agree that the continuance can be granted without releasing the defendant from custody pursuant to the bail act.

First, I do not agree that the periods of delay which may be excluded from the computation of the trial date found in United States Code Section 3161(h), apply to a defendant who is incarcerated solely for the purpose of awaiting trial.

By implication, in the case of Sara Jane Moore, against the United States District Court, the Ninth Circuit has rejected this contention.

The Circuit Court in that case could have held that the provisions of 3161(h) are incorporated into 3164 but they did not. Instead the Court merely held that a person who is undergoing a 4244 examination is not a defendant detained solely because he is awaiting trial during the time of the study and the hearings on the study.

Secondly, there is no provision in the Speedy Trial Act which makes Section 3161(h) applicable to the interim limit found in Section 3164.

The Second Circuit rules upon which the government relies in its analysis of the legislative history of the Speedy Trial Act contained an explicit provision incorporating exclusion to the situation where the defendant is incarcerated solely for the purpose of awaiting trial.

The next step in the government's argument is even more difficult to accept because it is built upon the shaky foundation, which I earlier referred to.

The government concedes that General Order Number 63 promulgated by this district, last September, and adopted, requires on its face that an incarcerated defendant be released if his trial has not commenced within the 90-day period.

It argues, however, that despite this mandatory language, the general order must be interpreted to allow the Section 3161(h) period of delay to be excluded from the computation of the 90-day time limit.

This Court rejects that for three reasons.

First, as earlier stated, the Court disagrees with the foundation, namely, that the Speedy Trial Act, standing alone, would require the periods of time to be excluded from the computation of the 90-day limit.

Second, accepting for the moment this contention, the Court sees no reason why a district plan may not be more restrictive than the Speedy Trial Act itself in making sure that the trials of incarcerated defendants proceed within the 90-day period.

Third, Section 7 of the district plan expressly incorporates Section 3161(h) with respect to retrial; this provides additional evidence for the proposition that such periods of delay were not intended to be excluded in the initial trial of an incarcerated defendant, which is the case we have here.

Other comments seem appropriate at this point. In view of the Court's determination with respect to bail in this case, it is reluctant to take the step it is now taking. However, I feel compelled by my interpretation of the Speedy Trial Act as passed by the Congress, and the general order promulgated by this district to do so.

* * * *

William E. Foley
Deputy Director